UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMPERSAND PUBLISHING, LLP d/b/a SANTA BARBARA <i>NEWS-PRESS</i> , Employer,)))
and) Case: 31-CA-29253
GRAPHIC COMMUNICATIONS CONFERENCE, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Union))))

EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

COMES NOW, the Respondent, Ampersand Publishing, LLC d/b/a *Santa Barbara News-Press* ("the *News-Press*"). Pursuant to Section 102.46 of the National Labor Relations Board's ("NLRB") Rules and Regulations, Series 8, as amended, with these Exceptions to the February 5, 2010 Decision and Recommended Order of Administrative Law Judge Lana Parke in the abovenamed and numbered case. The *News-Press* excepts:

1. To the conclusion of law that "the Respondent violated Section 8(a)(1) of the Act by issuing subpoenas to current and former employees prior to their testimony at a Board hearing that required their copies of affidavits they had submitted to the Board in an unfair labor practice" (DEC. 9:8-10¹), as such a conclusion is contrary to the evidence on the record as a whole, and contrary to law.

¹ References to the Decision of ALJ Parke will be designated as "DEC." with citations to the corresponding page, line and number(s). References to the Transcript will be designated as "TR." with the corresponding page and line numbers(s). References to Respondent exhibits will be designated as "RESP. XX." References to General Counsel exhibits will be designated as "G.C. Ex. XX."

- 2. To the conclusion of law that "the unfair labor practices set forth above affect commerce within the meaning of Sections 8(a)(3) and (1) and Section(2)(6) and (7) of the Act (DEC. 9:11-12), as such a conclusion is contrary to the evidence and the record as a whole, and contrary to law.
- 3. To the failure to find and conclude, based on the record evidence as a whole, that the News-Press did not violate the National Labor Relations Act ("the Act") in any respect, and that the Complaint should have been dismissed in its entirety.
- 4. To the cease and desist provision of the ALJ's Recommended Order and to each of them individually, as each cease and desist provision is contrary to the evidence and the record as a whole, and contrary to law. (DEC. 9:34-45).
- 5. To the affirmative action provision of the Recommended Order, and to each of them individually as such affirmative action provisions are contrary to the evidence in the record as a whole, and contrary to law. (DEC. 9:47-10:22).
- 6. To the Notice to Employees recommended by the ALJ (DEC. Appendix), as such Notice is contrary to the evidence on the record as a whole, and contrary to law.
- 7. To misrepresenting the issue in the Decisions, as such a representation is contrary to the evidence on the record as a whole. (DEC. 1:²).
- 8. To the finding that the *News-Press* "advertised nationally-sold products, including Cingular ..." (DEC. 2:4), as such a finding is unsupported by the record and contrary to fact.
- 9. To the finding that the *News-Press* "purchased and received at its facility goods valued in excess of \$5,000 directly from suppliers located outside the state of California ..." (DEC. 2:5-6), as such a finding is inconsistent with the statutory threshold necessary to meet the commerce requirements of Section 2(2), 2(6), and/or 2(7) of the Act.
- 10. To the references and findings of facts with respect to the "2007 subpoenas" (DEC. 2:39-43; 5:27-30; 8:14-35), as such findings were contrary to law and fact.
- 11. To the finding that "the 2009 subpoenas, in pertinent part, requested that the subpoenaed individuals produce affidavits provided to Region 31 that pertained to the unfair labor practice charges underlying the March 2009 complaint ..." (DEC. 3:25-27), as such a finding is contrary to fact.
- 12. To the finding that ALJ Anderson conducted "a twenty-day hearing ..." (DEC. 3:30), as such a finding is contrary to fact.

² There are no line numbers on page one of ALJ Parke's Decision.

- 13. To the finding that the "policy" described in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) applied the instant case, as such a finding is contrary to fact and law. (DEC. 4:29-5:25).
- 14. To the failure to receive evidence regarding NLRB Charge No. 31-CA-28662 (DEC. 4:39-46; RESP. Ex. 9 (rejected); RESP. Ex. 10 (rejected)).
- 15. To the failure to find that the subpoenas were a procedural matter resolved before ALJ Anderson in NLRB Case No. 31-CA-28589 et al, thus mooting NLRB Case No. 31-CA-29253 (DEC. 6:6-12).
- 16. To the finding that the *News-Press* was "not entitled to employee witness statements given to the Board except and until employees have testified in a Board proceeding and then only after a timely request for statements is made for the purpose of cross-examination ..." (DEC. 5:4-6), as such a finding is contrary to law.
- 17. To concluding that policy considerations explained in *Robbins Tire & Rubber Co.*, relating to *the Board* applied to a non-Board individual in the context of a subpoena authorized by the Executive Secretary. (DEC. 5:6-25).
- 18. To the finding that *H.B. Zachary's Co.*, 310 NLRB 1037 (1993) applied to the specific facts of this particular case. (DEC. 5:21-25; 5:43-53).
- 19. To the failure to explain how the General Counsel proved its case.
- 20. To the inexplicable change of the burden of proof whereby ALJ Parke required the *News-Press* to disprove the allegations of the General Counsel rather than explaining how the General Counsel met its burden of proof by a preponderance of the evidence.
- 21. To the conclusion that mere "service" of NLRB subpoena issued by the Executive Secretary constituted an unfair labor practice (DEC. 6:9-11), as such a conclusion is contrary to law.
- 22. To the failure to find that the Noerr-Pennington Doctrine was a valid defense to the allegations of the General Counsel. (DEC. 6:14-7:6).
- 23. To the finding that the Noerr-Pennington Doctrine "provides that in certain context, the First Amendment protects otherwise illegal conduct if it is part of a direct petition to government or 'incidental' to a direct petition ..." (DEC. 6:20-22), as such a finding is contrary to law.
- 24. To the legal conclusion that the Petition Clause of the United States Constitution is limited to the judicial process and not applicable to NLRB proceedings (DEC. 6:22-26), as such a finding is contrary to law.

- 25. To the finding that the Noerr-Pennington Doctrine does not apply to "incidental" conduct associated with constitutionally protected activity in the context of a labor dispute (DEC. 6:24-29), as such a finding is contrary to law.
- 26. To the conclusion that "subpoening documentary evidence from witnesses for potential use in a judicial proceeding is conduct incidental to direct petitioning ..." (DEC. 6:29-30), as such a finding is not supported by fact or law.
- 27. To the finding that *B.E.&K. Constr. Co.*, 351 NLRB 451 (2007) is in apposite to the issue herein ..." (DEC. 6:48), as such a finding is contrary to fact and law.
- 28. To the conclusion that even assuming, *arguendo*, that *B.E.&K*. applied to the instant case, "it is apparent that the subpoena requests could be unfair labor practices if the requests lacked reasonable bases and were brought with coercive purpose ..." (DEC. 6:49-7:3), as such a finding is contrary to law.
- 29. To the failure to find that the allegations of the complaint should be dismissed because a subpoena served in the context of NLRB litigation, even assuming, *arguendo*, that it is retaliatory, is protected pursuant to the First Amendment of the Constitution. (DEC. 7:3-6).
- 30. To the failure to find that the *News-Press* was entitled to a personally possessed affidavit because no recognizable privileged protected the personally possessed affidavit and that if there was a privilege, it was waived. (DEC. 7:7-9).
- 31. To the failure to find that the following facts constituted a waiver of any applicable privilege: "a personally possessed affidavit is not held in the Board's investigatory files; no one from the Region informed affiants that their affidavits were confidential, admonish them not to share their affidavits or gave safeguarding cautions; the Region does not act as the affiants' personal attorney; the regional investigator did not inform the affiant that their affiant disclosures were protected by any sort of attorney-client privilege; the Region voluntarily provided affiants with their affidavits" (DEC. 7:11-16).
- 32. To the conclusion that an administrative policy artificially crafted by an executive branch agency trumps judicial findings on legislatively enacted and codified standards, as such a finding is contrary to law. (DEC. 7:16-22).
- 33. To the failure to conclude that the Act, through the provisions of Section 8(a)(4), address the fabricated concerns about "chilling ... the Board's investigatory sources ..." (DEC. 7:22-23).
- 34. To switching the burden of proof and stating: "The Respondent has not persuasively explained why the Board's policy does not protect the employee

- statements it subpoena ..." (DEC. 7:24-25), as such a finding is contrary to law and the facts.
- 35. To the misstatement that the *News-Press* argued "that a personally possessed copy of an affidavit must be produced pursuant to FRE 401, 402, 203 ..." (DEC. 7:48-49), as such a statement is unsupported by the record.
- 36. To the failure to find that a personally possessed copy of an affidavit or other statement is relevant pursuant to FRE 401, 402, and 403, as such a failure is contrary to law.
- 37. To the finding that the *News-Press* "has not identified any evidentiary rule therein that would compel subpoenaed employees to produce investigatory Board affidavits, even those personally possessed …" (DEC. 7:30-32), as such a finding is contrary to law and fact.
- 38. To the failure to find that FRE 502 applies to the waiver of attorney-client privilege and work-product protects, as such a failure is contrary to law.
- 39. To the failure to find that FRE 612 compelled the production of a personally possessed copy of an affidavit provided to a subpoenaed individual by the Region during an investigation, as such a finding was contrary to law. (DEC. 7:33-8:6).
- 40. To the finding that "the FRE does not insulate [the *News-Press*] from charges that its 2009 subpoena demand for employee witness statements interfered with, restrained, or coerced employees in violation of the Act ..." (DEC. 8:7-10), as such a finding is contrary to law.
- 41. To the self-serving statement that ALJ Parke viewed the case "objectively" (DEC. 8:11), as such a statement is contrary to the facts.
- 42. To the finding that "the 2009 subpoenas require[ed] its current or former employees to produce affidavits they had provided to the Board ..." (DEC. 8:12-13), as such a finding is contrary to the facts.
- 43. To basing any of her decision on subpoenas issued in 2007, as such a finding was contrary to law and the facts. (DEC. 8:14-36).
- 44. To the finding that "through the issuance of the 2009 subpoenas, [the *News-Press*] again sought production of restricted witness statements ..." (DEC. 8:16-17), as such a finding is contrary to the facts.
- 45. To the finding that the *News-Press* "twice-repeated [an] attempt to force current or former employees to disclose protected witness statements outside the parameters set by the Board's Rules …" (DEC. 8:17-20), as such a finding is contrary to law and the facts.

- 46. To the finding that the actions of the *News-Press* could "reasonably be expected to have a chilling effect on employees' right to cooperate in Board investigations ..." (DEC. 8:19-20), as such a finding is contrary to law and the facts.
- 47. To the finding that "it is both logical and realistic to expect reasonable employees to fear that the Board might not be able to prevent premature or improper release of voluntary witness statements, which, in turn, might subject them to employer intimidation or coercion regarding their cooperation in the investigation or their testimony at a hearing, all of which could chill employee rights ..." (DEC. 8:22:26), as such a finding is contrary to law and the facts.
- 48. To the finding that "viewed subjectively, [the *News-Press*] must have intended such a coercive effect ..." (DEC. 8:26), as such a finding is contrary to law and the facts.
- 49. To the finding that the *News-Press* "provided no viable explanation or legal justification for twice seeking employees' Board statements …" (DEC. 8:27-28), as such a finding is contrary to law and the facts.
- 50. To the reliance on ALJ Kocol's decision as precedent, as such a finding is contrary to law. (DEC. 8:28-31).
- 51. To the conclusion that "the reasoning of Judge Kocol's ruling unmistakably applied to similar subpoena requests that [the *News-Press*] pressed for in the 2009 subpoenas ..." (DEC. 8:31:32), as such a finding was contrary to law and the facts.
- 52. To the finding that "Judge Kocol's ruling had to have [the *News-Press*] on notice that such subpoena requests were improper and would not be sustained ..." (DEC. 8:32-33), as such a finding was contrary to law and the facts.
- 53. To the finding that the *News-Press* had "a work environment tainted by the numerous serious, unremedied unfair labor practices found by Judge Kocol ..." (DEC. 8:34-35), as such a finding was contrary to law and the facts.
- 54. To the finding that in the circumstances "it is not only reasonable, but nearly unavoidable to infer that in issuing, the Respondent was motivated, at least in part, by a desire to quell employee willingness to give evidence to, or for, the General Counsel ..." (DEC. 8:35-38), as such a finding was contrary to law and the facts.
- 55. To the failure to permit counsel to conduct the examination of Karna Hughes pursuant to Fed. R. Evid. 611(c). (Tr77-79;90-91).

56. To the failure to provide to the *News-Press*, pursuant to Section 102.118(b)of the Board's Rules and Regulations, Series 8, as amended, Mr. Mineards' February 13, 2009 affidavit. (Tr. 28-31).

CONCLUSION

WHEREFORE, for any and all of the foregoing reasons, the *News-Press* respectfully requests that the complaint in NLRB Case No. 31-CA-29253 be dismissed in its entirety. Furthermore, the *News-Press* respectfully requests that these exceptions, and the accompanying brief in support of exceptions be granted, and that the Decision and Recommended Order of ALJ Lana Parke be reversed and modified to the extent that the *News-Press* has excepted hereto.

Dated: March 19, 2009 Santa Barbara, CA and Nashville, TN

Respectfully Submitted,

CAPPELLO & NOËL LLP

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Exception to the Decision and Recommended Order of the Administrate Law Judge was filed electronically and served via email on this 19th day of March, 2010 on the following:

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